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No. 96-8516

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**In the Supreme Court of the United States**

OCTOBER TERM, 1997

KENNETH EUGENE BOUSLEY, PETITIONER

v.

JOSEPH M. BROOKS, WARDEN

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

**BRIEF FOR THE UNITED STATES**

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### QUESTION PRESENTED

Whether petitioner, who pleaded guilty in 1990 to using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c), and who did not challenge his conviction on direct appeal, may move pursuant to 28 U.S.C. 2255 to vacate his conviction in light of *Bailey v. United States*, 516 U.S. 137 (1995).

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**BRIEF FOR THE UNITED STATES**

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**OPINION BELOW**

The opinion of the court of appeals (J.A. 156-164) is reported at 97 F.3d 284.

**JURISDICTION**

The judgment of the court of appeals was entered on October 3, 1996. A petition for rehearing was denied on December 18, 1996. Pet. App. 7. The petition for a writ of certiorari was filed on March 18, 1997, and was granted on September 29, 1997 (118 S. Ct. 31). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATEMENT

Following a plea of guilty in the United States District Court for the District of Minnesota, petitioner was convicted of possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and use of a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. 924(c). J.A. 81. He was sentenced to 78 months' imprisonment on the drug charge and to a consecutive term of 60 months' imprisonment on the Section 924(c) charge, to be followed by four years of supervised release. J.A. 83-84. Petitioner appealed his sentence and the court of appeals affirmed. *United States v. Bousley*, 950 F.2d 727 (8th Cir. 1991) (Table).

Petitioner subsequently filed a motion under 28 U.S.C. 2255, attacking the validity of his plea to the Section 924(c) charge. J.A. 104-114.<sup>1</sup> That motion was denied. J.A. 154-155. Petitioner appealed, and the court of appeals affirmed the denial of petitioner's motion. J.A. 156-165.

1. a. On March 19, 1990, police officers executed a search warrant at petitioner's house in Minneapolis, Minnesota. The officers found two coolers in the

<sup>1</sup> Although petitioner styled his pleading as a petition for habeas corpus pursuant to 28 U.S.C. 2241, and named Joseph M. Brooks, the warden of the prison where he was incarcerated, as the respondent, the district court treated the petition as a motion under Section 2255. J.A. 104, 145 & n.2. We are therefore filing a motion requesting the Court to substitute the United States as the respondent. See Rules Governing Section 2255 Proceedings, Rule 2 advisory committee's note (1976 Adoption) ("[T]here is no requirement that the movant name a respondent" in a Section 2255 proceeding since it is a motion in the criminal case and "the federal government is the movant's adversary of record."); cf. Sup. Ct. R. 35.4.

garage. Inside the coolers were two briefcases containing 3,153 grams (about seven pounds) of a mixture containing methamphetamine. The briefcases also contained two loaded handguns and one unloaded handgun. A coffee can in the garage contained an additional 33 grams of methamphetamine mixture. The officers found another 6.9 grams of methamphetamine mixture and two loaded handguns in petitioner's bedroom. J.A. 8, 157.

b. Petitioner was charged in a superseding indictment with possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with use of a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. 924(c). J.A. 5-6.<sup>2</sup> He subsequently agreed to plead

<sup>2</sup> The Section 924(c) count of the indictment alleged that:

On or about March 19, 1990, in the State and District of Minnesota, the defendant,

KENNETH EUGENE BOUSLEY,

knowingly and intentionally used the following firearms during and in relation to a drug trafficking crime; namely, the crime of possession of methamphetamine with the intent to distribute it[,] which is a felony that may be prosecuted in a court of the United States:

A loaded Walther PBK .38 caliber handgun, serial no. A016494;

A loaded .22 caliber Advantage Arms 4-shot revolver;

A loaded .22 caliber North American Arms handgun, serial no. C7854;

A loaded .45 caliber Colt Model 1911 semi-automatic handgun, serial no. 244682;

An unloaded Ruger .357 caliber revolver, serial no. 151-36099;

guilty to both charges, while reserving the right to challenge the quantity of drugs used to determine his sentence. J.A. 7-12.

The plea agreement contained the following stipulation on the factual basis for the plea:

The parties also agree that, on or about March 19, 1990, \* \* \* [petitioner] knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in [petitioner's] bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. [Petitioner] admits ownership and possession of these two guns.

J.A. 8. Petitioner admitted that he was aware that there were 6.9 grams of methamphetamine mixture in his bedroom and 33 grams of methamphetamine mixture in the coffee can in his garage. He also acknowledged that the police had seized 3,153 grams of methamphetamine mixture and three other firearms from two briefcases in his garage. J.A. 7-8.

At the change-of-plea hearing, the court conducted the colloquy required by Federal Rule of Criminal Procedure 11. When the district court asked petitioner if he knew what he was charged with in the second count of the indictment, petitioner initially responded, "[p]ossession of a firearm." J.A. 25. The district court immediately explained to petitioner

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all in violation of Title 18, United States Code, Section 924(c).

J.A. 5-6.

that he was charged with "possessing the firearms during \* \* \* and in relation to a drug trafficking crime." *Ibid.* Petitioner admitted that he owned the two firearms that were seized from his bedroom, and he agreed that they were in close proximity to the 6.9 grams of methamphetamine mixture (which he contended were for personal use). J.A. 24, 27. Petitioner acknowledged that he had been making sales of methamphetamine from the premises within the 72-hour period preceding the application for the search warrant. J.A. 28-29. He also admitted that he had intended to sell the 33 grams of methamphetamine mixture in the coffee can. J.A. 24. Although he initially denied keeping the guns in his bedroom in order to assist in his sales of illegal drugs, he subsequently acknowledged that the guns were "available" if he needed them for that purpose. J.A. 27.<sup>3</sup> Defense counsel declared that he was "satisfied under the state of the law in [the Eighth] Circuit that there is a factual basis" for petitioner's plea of guilty to the Section 924(c) charge. *Ibid.* Petitioner then pleaded guilty to both counts. J.A. 29. The district court accepted the pleas, finding that petitioner was "competent to enter these pleas, that they've been voluntarily entered, and that there is a factual basis for them." J.A. 29-30.

c. The district court conducted an evidentiary hearing for purposes of sentencing. At the hearing, petitioner admitted that he owned the two guns seized from his bedroom, but denied knowledge that any other guns were on his premises. J.A. 59. Petitioner

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<sup>3</sup> The district court explained to petitioner that, if he wanted to contest the issue of the relationship between the drugs and the firearms, he would have to go to trial. Petitioner indicated that he understood. J.A. 28.

testified that he had bought methamphetamine about 30 times in his garage between September 1988 and March 19, 1990 (the date of his arrest); that the largest quantity delivered to him was about 12 ounces; that that quantity had been delivered on March 18, 1990; that he had weighed out a portion of that methamphetamine into distribution quantities for his source and put the rest into the coffee can in the garage; that the methamphetamine in the coffee can and in his bedroom on March 19 belonged to him and was the only methamphetamine he knew to be on his premises that day; and that he "wasn't fully aware" that the briefcases were on his premises on March 19, but that he had seen one of them (the "small, narrow, brown" one containing about two of the seven pounds of methamphetamine mixture) in his garage in September or October 1989. J.A. 53-58. Petitioner admitted that, on the day of his arrest, when the police asked him if he knew that the briefcases contained methamphetamine, he replied, "I knew what—that there was some. I didn't think there was what you said, seven pounds or whatever." J.A. 65. Petitioner acknowledged that his statement to the police was true and correct. J.A. 64.<sup>4</sup>

Following the hearing, the district court determined that petitioner's sentence should be based on

<sup>4</sup> The statement, which was transcribed in question-and-answer format, was signed by petitioner, Gov't C.A. Br. Addendum 1-21 (No. 90-5598), and admitted into evidence at the hearing. J.A. 67-68. Also at the hearing, FBI Agent Michael Kelly testified that on March 21, 1990, petitioner gave an "extensive" statement in which he admitted that, over the three-month period between December 1989 and February 1990, his source had supplied him with a total of about six pounds of methamphetamine at petitioner's residence. J.A. 67-73.

946.9 grams of methamphetamine mixture, which was the combined total of the quantities found in petitioner's bedroom (6.9 grams), in the coffee can (33 grams), and in one of the two briefcases (907 grams). J.A. 78-79, 91. The district court concluded that a five-year mandatory-minimum sentence applied to the drug count, pursuant to 21 U.S.C. 841(b)(1)(B)(viii) (five-year mandatory-minimum sentence applies to violations of Section 841(a) involving "100 grams or more of a mixture or substance containing a detectable amount of methamphetamine"). 11/2/90 Sent. Tr. 3-5. It further concluded that petitioner's offense level was 28 and his criminal-history category was I. *Id.* at 5. That resulted in a Guidelines range of 78-97 months' imprisonment on the drug count. *Ibid.* The court imposed a sentence of 78 months' imprisonment on the drug count, a consecutive term of 60 months' imprisonment on the Section 924(c) count, and four years of supervised release. J.A. 83-84.

2. Petitioner appealed his sentence, challenging the district court's finding that he should be held accountable for slightly under a kilogram of methamphetamine mixture. Pet. C.A. Br. (No. 90-5598). Petitioner did not challenge the validity of his plea to the Section 924(c) charge. The court of appeals affirmed. *United States v. Bousley*, 950 F.2d 727 (8th Cir. 1991) (Table).

3. On June 6, 1994, petitioner filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. 2241. J.A. 104-109. He challenged the factual basis for his guilty plea on the ground that neither the "evidence" nor the "plea allocution" showed a "connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." J.A. 109; see also J.A. 110-114. The government opposed the peti-

tion, arguing that petitioner had procedurally defaulted his claim by not raising it on direct appeal, and that in any event there was an adequate factual basis for the plea. J.A. 123-126. In response, petitioner argued that his procedural default should be excused because he had received ineffective assistance of counsel. J.A. 128-129.<sup>5</sup> On the merits, petitioner argued that “[t]here was no connection between the drugs and the firearms in this case—the guns simply happened to be in the house well away from the drugs in the unattached garage.” J.A. 131.

A magistrate judge recommended that the petition be treated as a motion under 28 U.S.C. 2255 and dismissed. J.A. 144-153. The magistrate judge concluded that there was a factual basis for petitioner’s guilty plea because the guns in petitioner’s bedroom were in close proximity to drugs and were readily accessible. J.A. 148-153. The district court adopted the magistrate judge’s Report and Recommendation and ordered that the petition be dismissed. J.A. 154-155.

4. Petitioner appealed. While his appeal was pending, this Court held, in *Bailey v. United States*, 516 U.S. 137 (1995), that a conviction for use of a firearm under Section 924(c) requires the government to show “active employment of the firearm.” *Id.* at 144. Active employment includes uses such as “brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire” the weapon.

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<sup>5</sup> Petitioner rested his assertion of ineffective assistance of counsel on a series of letters between himself and his trial attorney, all dated after petitioner’s guilty plea, concerning petitioner’s belief that a jury might acquit him on the Section 924(c) charge because there was an inadequate nexus between the guns and the drugs. J.A. 133-143.

*Id.* at 148. The Court held, however, that mere possession of a firearm does not constitute a “use.” *Id.* at 143. Thus, “[a] defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds,” or for “placement of a firearm to provide a sense of security or to embolden.” *Id.* at 149.

After the decision in *Bailey*, the court of appeals appointed counsel to represent petitioner. Petitioner’s attorney filed a supplemental brief arguing that petitioner’s Section 924(c) conviction should be vacated in light of *Bailey*. Pet. Supp. C.A. Br. (No. 95-2687). Petitioner argued that *Bailey* should be applied retroactively, that his plea of guilty was involuntary because he was misinformed about the elements of a Section 924(c) offense, and that this claim was not waived by his guilty plea. *Id.* at 2-5. The government filed a responsive supplemental brief, reiterating the argument that petitioner had waived his claim, because he had pleaded guilty and had failed to challenge the validity of his plea on direct appeal. Gov’t Supp. C.A. Br. 2-5 (No. 95-2687).<sup>6</sup>

5. The court of appeals affirmed the district court’s order dismissing petitioner’s motion. J.A. 156-165. The court of appeals began by noting that petitioner had failed to challenge the validity of his Section 924(c) plea on his direct appeal. As a result, the court of appeals concluded, “[a]bsent a showing of cause and prejudice, [petitioner] may not now bring

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<sup>6</sup> The government also pointed out that its decision not to cross-appeal from the district court’s holding that petitioner was responsible for only some of the methamphetamine mixture had been influenced by the assumption that petitioner was not contesting the validity of his Section 924(c) conviction. Gov’t Supp. C.A. Br. 4-5 (No. 95-2687).

[this] claim[] through collateral attack." J.A. 159. The court of appeals rejected petitioner's contention that his procedural default should be excused because neither he nor his counsel could have foreseen the *Bailey* decision. Relying on *United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996), the court concluded that "*Bailey* does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted." J.A. 160.<sup>7</sup>

Nor, the court concluded, did petitioner's guilty plea excuse his procedural default. The court reasoned that "a defendant who enters a guilty plea with no conditions as to guilt waives all challenges to the prosecution of his or her case except for those related to jurisdiction." J.A. 160 (internal quotation marks omitted). The court noted that "a plea agreement is a process of negotiation and concession," and it declined to "allow this process to be undone years after the fact." J.A. 161. Accordingly, the court determined that "procedural default and waiver apply to those convictions that follow a guilty plea no less than to those that follow a trial." *Ibid.* Because the court found "no indication that [petitioner's] plea was involuntary or uninformed," it concluded that petitioner had "waived the right to collateral review of his con-

<sup>7</sup> This Court later granted certiorari in *McKinney*, vacated the judgment, and remanded for further consideration in light of *Johnson v. United States*, 117 S. Ct. 1544 (1997). *McKinney v. United States*, 117 S. Ct. 1816 (1997). On remand in *McKinney*, the Eighth Circuit vacated McKinney's Section 924(c) conviction. It applied the plain-error standard to McKinney's *Bailey* claim, which McKinney raised in a direct appeal after defaulting the claim at trial. *United States v. McKinney*, 120 F.3d 132 (8th Cir. 1997).

viction unless he can show cause for his procedural default and resulting prejudice." J.A. 162.

The court also rejected petitioner's claim that his default should be excused because he received ineffective assistance of counsel. In particular, the court concluded that petitioner's counsel had not acted unreasonably in advising petitioner not to challenge his Section 924(c) conviction on appeal, given counsel's understanding of the interpretation of Section 924(c) before *Bailey*. J.A. 163. The court also observed that counsel had fully explained to petitioner his reasons for recommending against raising the issue on appeal and had advised petitioner that he should seek other counsel if he nevertheless wished to do so. *Ibid.* Accordingly, the court concluded that petitioner "has waived his right to collateral review of his section 924(c) conviction by pleading guilty and by failing to challenge the conviction on direct appeal." *Ibid.*

6. Petitioner filed a petition for a writ of certiorari, arguing that *Bailey* should be applied retroactively, Pet. 7-8, and that petitioner had not waived his claim that his plea was invalid because the plea was based on an incorrect understanding of the elements of a Section 924(c) violation, Pet. 8. In responding to the petition, we expressed the view that the transcript of the plea hearing indicated that, in light of this Court's intervening decision in *Bailey*, petitioner had "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Gov't Br. 9 (filed June 6, 1997). We also stated that, although the court of appeals properly held that petitioner could not show cause for his procedural default in failing to raise his claim before final judgment was entered on his guilty plea,

the court erred in suggesting that his guilty plea waived his right to seek collateral review and in failing to inquire whether petitioner should be excused from showing cause if he could make an adequate showing of "actual innocence." *Id.* at 7, 10. Accordingly, we suggested that the Court grant the petition, vacate the judgment, and remand the case for further proceedings on the question of petitioner's actual innocence. *Id.* at 7, 11-12. This Court granted plenary review, 118 S. Ct. 31 (1997), and appointed an amicus curiae to brief and argue the case in support of the judgment below, 118 S. Ct. 463 (1997).

#### SUMMARY OF ARGUMENT

Petitioner claims that his plea of guilty to a violation of 18 U.S.C. 924(c) was not intelligent and voluntary, because, in light of this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), his plea rested upon an inaccurate understanding of the elements of Section 924(c). Pet. Br. 14-18. We agree that petitioner may rely on *Bailey* in arguing that his plea was not entered intelligently and voluntarily in a motion filed pursuant to 28 U.S.C. 2255. Petitioner may not raise that claim for the first time on collateral review, however, unless he can make a sufficient showing of actual innocence under Section 924(c) as construed in *Bailey*.

A. This Court's decision in *Bailey* defines the substantive reach of a federal criminal statute, and thus should have full retroactive application to cases on collateral review. A decision of this Court construing a federal statute "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-

313 (1994). There are no common law crimes in the federal system, and the lower federal courts have no power to create criminal liability by statutory interpretation. Thus, a decision by this Court cutting back on the scope of a federal crime, as previously understood by a lower court, creates the possibility that a person has been convicted for an act that the Congress has not made criminal. An appropriate purpose of collateral review is to consider a claim that, based on such an intervening decision of this Court, a defendant may have been convicted for conduct that is not a crime.

Sound principles of finality dictate that, as a general matter, new constitutional rules of criminal procedure do not have retroactive application in cases on collateral review. *Teague v. Lane*, 489 U.S. 288 (1989). A similar rule of nonretroactivity should govern new interpretations of statutory procedural rights. But an intervening decision that may show that a defendant stands convicted "for an act that the law does not make criminal" stands on a different footing. *Davis v. United States*, 417 U.S. 333, 346 (1974). The function of the writ of habeas corpus in protecting against miscarriages of justice justifies according retroactive application to such a new decision.

B. In light of *Bailey*, petitioner's plea of guilty was not intelligent and voluntary. All of the participants at petitioner's guilty plea incorrectly believed that petitioner could properly be convicted of using a firearm in violation of Section 924(c) without any element of active use of the firearm. Under this Court's subsequent decision in *Bailey*, that understanding was incorrect. And petitioner did not acknowledge active use of a firearm in the proceedings on his plea. Under

those circumstances, petitioner had "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976).

It is true that the misunderstanding of Section 924(c) was reasonable in light of Eighth Circuit case law at the time of petitioner's plea. It is also settled that, with respect to most legal issues, a guilty plea is not rendered constitutionally invalid because the decision to plead guilty was influenced by what turns out to be, in hindsight, an incorrect understanding of the law. See, e.g., *Brady v. United States*, 397 U.S. 742, 756-758 (1970). But a guilty plea entered on the basis of gravely inaccurate information about the true elements of the charged offense may not be intelligent and voluntary. Whatever the reasonable understanding of Section 924(c) at the time of his guilty plea, petitioner did not receive "real notice of the true charge against him, the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941).

C. By failing to challenge the voluntariness of his guilty plea on direct appeal, however, petitioner procedurally defaulted that claim. See *Reed v. Farley*, 512 U.S. 339, 354 (1994); *United States v. Frady*, 456 U.S. 152, 168 (1982). Ordinarily, a defaulted claim cannot be heard on collateral review absent a showing of cause to excuse the default and prejudice from failing to entertain the claim. Petitioner has not established cause for his procedural default. This Court's decision in *Engle v. Isaac*, 456 U.S. 107, 130 (1982), forecloses petitioner's claim that his default should be excused because it would have been futile for him to raise the claim on direct appeal. Nor can petitioner's default be excused on the ground that his claim was

novel, because many other defendants perceived and raised various forms of the claim. *Smith v. Murray*, 477 U.S. 527, 537 (1986).

Because petitioner defaulted his claim, and cannot establish cause for that default, his claim cannot be reviewed in this collateral proceeding unless he can demonstrate that the "constitutional violation has probably resulted in the conviction of one who is actually innocent" under Section 924(c). *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Review of a claim of actual innocence should consider not only the evidence adduced at the plea colloquy, but also such additional evidence as the parties may have to offer on the issue of culpability under Section 924(c). No such inquiry has been conducted here. Accordingly, the case should be remanded to permit petitioner to attempt to carry the burden of demonstrating his actual innocence.

## ARGUMENT

### PETITIONER MAY CHALLENGE HIS GUILTY PLEA BASED ON THIS COURT'S INTERVENING DECISION IN *BAILEY v. UNITED STATES* IF HE CAN OVERCOME HIS PROCEDURAL DEFAULT BY MAKING A SHOWING OF ACTUAL INNOCENCE

#### A. A Decision That Narrows The Substantive Scope Of A Federal Criminal Statute Has Retroactive Application In Collateral Challenges

In the federal system, the exclusive power to define criminal acts resides with Congress. There is neither a federal common law of crimes, *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), nor power vested in the judiciary to create criminal offenses through construction of statutes, *United States v.*

*Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). See *United States v. Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."). While lower federal courts may reach varying conclusions about the scope of a substantive criminal statute, a holding by this Court that a criminal statute does not extend to certain conduct "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). "[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 313 n.12.

At the time petitioner pleaded guilty to a violation of 18 U.S.C. 924(c) in 1990, the decisional law of the Eighth Circuit permitted conviction based on possession of a firearm without establishing "active use" of the firearm. See, e.g., *United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir. 1990); *United States v. Golter*, 880 F.2d 91, 94 (8th Cir. 1989); *United States v. Matra*, 841 F.2d 837, 841-842 (8th Cir. 1988). Thus, when the district court informed petitioner of the elements of an offense under Section 924(c) and determined whether petitioner understood that offense, it correctly followed Eighth Circuit law that "possession" of a firearm during and in relation to a drug offense constituted an offense. It is now clear, however, that "the Court[] of Appeals had misinterpreted the will of the enacting Congress." *Rivers*, 511 U.S. at 313 n.12. Section 924(c)'s prohibition of the "use" of a firearm never comprehended mere possession of a firearm; rather, the statute always required a showing of "active employment." *Bailey v. United States*, 516 U.S. 137, 144, 148 (1995); *Rivers*, 511 U.S. at 313

n.12. Thus, the district court's explanation of the elements of an offense under Section 924(c) was incorrect.

If *Bailey* had been handed down while petitioner's case was pending on direct review, petitioner could, without doubt, have claimed the benefit of the construction of Section 924(c) announced in *Bailey*. See *Griffith v. Kentucky*, 479 U.S. 314 (1987); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). Petitioner's direct appeal was completed in 1991, however, and his conviction therefore became final four years before *Bailey* was decided. The question therefore arises whether *Bailey* has retroactive application to cases, like this one, that arise on collateral review.<sup>8</sup> This Court has not directly faced the question whether a decision narrowing the substantive scope of a federal criminal statute is retroactively applicable on collateral review. Principles underlying the Court's collateral-review jurisprudence, however, suggest the answer. Where a defendant claims he may have been convicted of a federal criminal offense based on a materially inaccurate understanding of its elements, the intervening decision does have retroactive application.

Assessing the retroactive effect of a new judicial decision in cases on collateral review requires strik-

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<sup>8</sup> Petitioner's Section 2255 motion was filed in June 1994, and he filed a notice of appeal from the denial of that motion in June 1995. J.A. 4, 104-109. Although Section 2255 was amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220, those amendments do not apply to the present case. Cf. *Lindh v. Murphy*, 117 S. Ct. 2059, 2063-2068 (1997) (AEDPA's amendments to 28 U.S.C. 2254 do not apply to petitions pending on April 24, 1996, the effective date of the AEDPA).

ing a balance between the interest in finality and the interests served by providing a remedy in the nature of habeas corpus. *Teague v. Lane*, 489 U.S. 288, 305-314 (1989) (plurality opinion of O'Connor, J.). In light of "the purposes for which the writ of habeas corpus is made available," this Court has held that, subject to limited exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 306, 310 (plurality opinion); *Penry*, 492 U.S. at 313-314 (adopting *Teague* plurality's approach to retroactivity).<sup>9</sup> In most circumstances, the costs of retroactive application of new constitutional rules of criminal procedure on habeas corpus "far outweigh" the benefits of such application, *Teague*, 489 U.S. at 310 (plurality opinion)

<sup>9</sup> *Teague* identified two circumstances in which retroactive application of a new rule would be appropriate. 489 U.S. at 307, 309 (plurality opinion). The first exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (plurality opinion). The Court has since clarified that this exception also includes new rules that address "a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (internal quotation marks and brackets omitted); see *Penry*, 492 U.S. at 330 (if Eighth Amendment prohibited execution of mentally retarded persons regardless of the procedures followed, "such a rule would fall under the first [*Teague*] exception"). The second exception is limited to "watershed rules of criminal procedure" that implicate the fairness and accuracy of the criminal proceeding, *Teague*, 489 U.S. at 311-313 (plurality opinion), a class exemplified by the right to counsel in serious criminal cases, *Saffle*, 494 U.S. at 495.

(quoting *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in the judgment)), for the inroads on finality in such instances are considerable, and the quest for an error-free trial is unlikely to find success in light of evolving procedural norms.

Although *Teague* and its progeny involved new constitutional rules of procedure, the logic of *Teague* extends *a fortiori* to novel interpretations of statutory rules of criminal procedure. *Teague* emphasized that "the principle of finality \* \* \* is essential to the operation of our criminal justice system." 489 U.S. at 309 (plurality opinion). The premise of *Teague* is that collateral proceedings should not provide a "mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). That consideration applies fully where the later emerging legal doctrine is a novel interpretation of a nonconstitutional rule of federal criminal procedure.<sup>10</sup>

Indeed, a nonconstitutional claim may generally not be raised in collateral proceedings at all unless it constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Timmreck*, 441 U.S. 780, 783 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). Given that limitation on statutory claims, it is sensible to apply retroactivity limits to statutory claims as well.

<sup>10</sup> See, e.g., *Taylor v. United States*, 985 F.2d 844, 847 (6th Cir. 1993) (applying *Teague* to preclude federal prisoner from obtaining collateral relief based on *Gomez v. United States*, 490 U.S. 858 (1989) (Federal Magistrates Act does not authorize magistrates to preside over jury selection without consent of parties)); *United States v. Judge*, 944 F.2d 523, 525 (9th Cir. 1991) (same), cert. denied, 504 U.S. 927 & 506 U.S. 833 (1992).

Both the "fundamental defect" standard and retroactivity rules respect the value of finality when a case has reached the stage of collateral review. Each plays a role in reducing the costs of granting collateral relief for a procedural defect that was not recognized and remedied at the time of trial or on direct appeal.<sup>11</sup>

This case, however, does not involve a new ruling of criminal procedure. Rather, it involves a decision of this Court narrowing the reach of a substantive federal criminal statute. Such a ruling stands on a different footing from the type of claims addressed by *Teague*. The definition of an offense goes to the heart of the criminal process, for it establishes the boundaries between lawful and unlawful conduct. When this Court has construed a criminal statute not to embrace conduct covered under the interpretation of a

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<sup>11</sup> Petitioner and his amici suggest that *Teague* principles do not apply to motions filed by federal prisoners pursuant to Section 2255. ACLU Amicus Br. 14; NACDL/FAMM Amici Br. 11. This Court, however, has repeatedly rejected claims that it should distinguish between federal and state prisoners when applying analogous limitations on the scope of habeas relief. See, e.g., *United States v. Frady*, 456 U.S. 152, 166 (1982). Indeed, Justice Harlan's opinion in *Mackey v. United States*, 401 U.S. 667, 675-702 (1971) (concurring in the judgments in part and dissenting in part), which largely informed the reasoning of *Teague*, 489 U.S. at 310 (plurality opinion), expressly noted that no distinction should be drawn, "for retroactivity purposes, between state and federal prisoners seeking collateral relief." 401 U.S. at 681 n.1 (Harlan, J., concurring in the judgments in part and dissenting in part). And the lower federal courts have consistently held *Teague* to apply to federal prisoners. See, e.g., *United States v. Swindall*, 107 F.3d 831, 834 n.4 (11th Cir. 1997); *Van Daalwyk v. United States*, 21 F.3d 179, 181-183 (7th Cir. 1994); *Gilberti v. United States*, 917 F.2d 92, 94-95 (2d Cir. 1990).

lower federal court, the decision creates the possibility that a defendant stands convicted "for an act that the law does not make criminal." *Davis v. United States*, 417 U.S. 333, 346 (1974). The purposes of the writ of habeas corpus to protect against miscarriages of justice lend strong support to making such a new decision retroactively available in cases on collateral review. While the scope of the writ of habeas corpus is informed by principles of comity and finality, absent limitations imposed by Congress, "[i]n appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982); Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 n.37 (1970) ("[T]he prime objective of collateral attack should be to protect the innocent.").

In *Davis v. United States*, *supra*, this Court addressed the related question whether a defendant may state a cognizable claim under Section 2255 where an intervening decision, rendered after the affirmance of a conviction, indicates that a defendant has been convicted for "an act that the law does not make criminal." 417 U.S. at 346. The Court held that such a claim is cognizable, explaining that "[t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Id.* at 346-347 (internal quotation marks and brackets omitted). Although the Court did not decide whether the intervening decision of the court of appeals in that case should have retroactive effect, see *id.* at 341 n.12 (reserving question of retroactivity), the Court's recognition that a claim based on an intervening decision is cognizable under

Section 2255 to avoid a "complete miscarriage of justice" is instructive. If an intervening decision were held to have no retroactive application in Section 2255 proceedings, despite its determination of what the statute "always meant," *Rivers*, 511 U.S. at 313 n.12, a basic purpose that justifies collateral review would be defeated. The result could be to permit the imprisonment of an individual based on the commission of an "offense" defined by lower federal courts rather than by Congress.

The decision in *Bailey* adopted a narrowing construction of the crime defined in Section 924(c), compared to the definition applied under circuit law at the time of petitioner's plea. Petitioner should therefore be permitted to rely on *Bailey*'s construction of Section 924(c) in arguing that he is entitled to collateral relief from his plea of guilty.<sup>12</sup>

**B. Petitioner's Guilty Plea Was Not Intelligent And Voluntary Because He Did Not Have An Understanding Of An Essential Element of Section 924(c)**

1. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States v. Broce*, 488 U.S. 563, 569 (1989). The plea not only waives the defendant's rights to a trial by jury, to confrontation

<sup>12</sup> The courts of appeals have so held in considering the retroactive effect of *Bailey* to cases on collateral review. See, e.g., *United States v. Barron*, 127 F.3d 890, 893 n.2 (9th Cir. 1997); *Stanback v. United States*, 113 F.3d 651, 654 & n.2 (7th Cir. 1997); *United States v. McPhail*, 112 F.3d 197, 199 (5th Cir. 1997); *United States v. Barnhardt*, 93 F.3d 706, 708-709 (10th Cir. 1996).

of his accusers, and to assertion of the privilege against compulsory self-incrimination, but also constitutes an admission that the defendant committed an offense. *Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969).

To perform those functions validly, a guilty plea must be intelligent and voluntary. See, e.g., *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *Boykin*, 395 U.S. at 242-243. A guilty plea is not "voluntary[,] in the sense that it constituted an intelligent admission that [the defendant] committed the offense[,] unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Henderson*, 426 U.S. at 645 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). As the Court explained in *Henderson*:

A plea may be involuntary \* \* \* because [the defendant] has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.

*Id.* at 645 n.13. Put another way, a plea of guilty "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Broce*, 488 U.S. at 570 (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). Applying that principle, this Court in *Henderson* held that, where a state defendant was not informed that second-degree murder required proof of intent to kill, and he did not admit or imply that he had such an intent, the defendant's plea of guilty to second-degree murder was

involuntary, thus justifying relief under 28 U.S.C. 2254. 426 U.S. at 644-647.

2. Relying on *Henderson*, petitioner argues that he was deprived of the "right to be informed of the nature of the charges he faced." Pet. Br. 10-11. He does not base that claim on the theory that the advice he received was incorrect in light of prevailing circuit law. Pet. Br. 31-32. Nor could he make such a claim. The explanation that petitioner received of the elements of Section 924(c) was reasonable in light of Eighth Circuit case law at the time of the change-of-plea hearing. See p. 16, *supra*. Under this Court's decision in *Bailey*, however, that explanation was deficient. The question, therefore, is whether the intelligent and voluntary character of the plea is assessed in light of then-current law or under the offense as defined in *Bailey*.<sup>13</sup>

Normally, a guilty plea is not rendered unintelligent or involuntary when it appears that a defendant's decision to plead guilty was influenced by legal or factual premises that later turn out to be wrong. In *Brady v. United States*, 397 U.S. 742 (1970), for example, this Court stated that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Id.* at 757; see also *McMann v. Richardson*, 397 U.S. 759, 774 (1970) (a defendant who pleads guilty "does so under the law then existing

<sup>13</sup> The guilty plea itself does not waive a claim that the plea was not intelligent and voluntary. See, e.g., *Henderson*, 426 U.S. at 644-647; cf. *McCarthy*, 394 U.S. at 462-467 (defendant who pleaded guilty can raise on direct appeal claim that trial court failed to comply with requirements of Fed. R. Crim. P. 11).

\* \* \* [and] assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts").

Under that principle, a guilty plea is not rendered invalid because the defendant's decision to plead guilty was influenced by counsel's competent but incorrect advice about the admissibility of evidence, the possible sentencing consequences of going to trial, or the existence of possible constitutional claims or defenses. See *Broce*, 488 U.S. at 569-574 (voluntary and counseled guilty pleas were not invalid simply because defendants did not consciously relinquish potential double jeopardy defense to one count of conviction); *Tollett v. Henderson*, 411 U.S. 258, 261-269 (1973) (absent ineffective assistance claim, defendant who pleaded guilty on advice of counsel cannot raise claim of racial discrimination in selection of grand jury simply because he was not advised of it); *McMann*, 397 U.S. at 766-775 ("a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession"); *Brady*, 397 U.S. at 756-758 (guilty plea not invalid where counsel advised defendant, correctly under then-existing law, that defendant could receive death sentence if he went to trial); *Parker v. North Carolina*, 397 U.S. 790, 794-798 (1970) (guilty plea not invalid based on counsel's possibly incorrect assessment of sentencing exposure after a trial or admissibility of confession). As the Court summarized in *Brady*: "A defendant is not entitled to withdraw his plea merely because he

discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." 397 U.S. at 757.

The weight attached to guilty pleas in finally resolving criminal liability reflects the seriousness of the entry of a plea. "[A] guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady*, 397 U.S. at 748. Even before entry of a judgment of conviction based on a plea, courts enforce that act absent a "fair and just reason" for setting the plea aside. See *United States v. Hyde*, 117 S. Ct. 1630, 1634 (1997) (construing Fed. R. Crim. P. 32(e)). The reasons for adhering to a guilty plea on collateral review are even more compelling. See *Broce*, 488 U.S. at 572-574. With the passage of time, the fading of memories, and the possibility that the government may no longer be able to reconstruct its case, setting aside a guilty plea on collateral review based on a change in the law may seriously impair the fair determination of guilt. Moreover, as this Court suggested in *Broce*, "the already substantial interest the Government has in the finality of [a guilty] plea" may be further heightened where the plea is part of "a plea bargain which incorporates concessions by the Government." *Id.* at 576. See also, e.g., *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. \* \* \* These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality.").

Nevertheless, the policies favoring finality in guilty-plea cases are not absolute.<sup>14</sup> This case involves an erroneous legal premise about whether the acts committed by the defendant constitute an offense at all. A bedrock requirement for an intelligent and voluntary plea is that the defendant have an adequate understanding of whether the conduct at issue constitutes a crime. Where there is a change in the decisional law governing the elements of the offense, a defendant may have been deprived of "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson*, 426 U.S. at 645 (quoting *Smith v. O'Grady*, 312 U.S. at 334). The requirement of a voluntary plea in that sense cannot fairly be limited to the law prevailing at the time of the plea, without risking the possibility that a defendant may have pleaded guilty based on conduct that is not criminal.

<sup>14</sup> See generally *Broce*, 488 U.S. at 569-576 (plea of guilty may be challenged where "constitutional infirmity in the proceedings [lies] in the State's power to bring any indictment at all," and infirmity is apparent on face of record) (citing *Menna v. New York*, 423 U.S. 61 (1975) (per curiam); *Blackledge v. Perry*, 417 U.S. 21 (1974)); see also *Haynes v. United States*, 390 U.S. 85, 87 n.2 (1968) (plea of guilty does not waive claim that statute defining offense of conviction violated defendant's privilege against compulsory self-incrimination). We do not agree with the suggestion of petitioner (Br. 19-20) and his amici (ACLU Amicus Br. 20-21; NACDL/FAMM Amici Br. 24-26) that the claim at issue in this case falls within the exception noted in *Broce*. Petitioner's claim—that his plea of guilty was not intelligent and voluntary and that he is actually innocent of violating Section 924(c)—is not one that goes to the power of the United States to bring a Section 924(c) charge against him, and the validity of his "actual innocence" claim is not apparent on the face of the present record. See pp. 40-42, *infra*.

In none of this Court's cases judging the voluntariness of the plea in light of then-existing law did the defendant receive what turned out to be inaccurate information about the nature of the charge to which he pleaded guilty. All instead involved allegedly inaccurate advice (or a lack of advice) about matters that were relevant to the question whether it was advisable to plead guilty to a charge that the defendant properly understood. In several of the cases, in fact, the Court indicated that the defendants had been properly advised about the nature of the charges against them. See *Broce*, 488 U.S. at 570, 574 (Fed. R. Crim. P. 11 requires that the defendant must be instructed in open court on the nature of the charge to which he is pleading guilty, and Rule 11 was satisfied in this case); *Brady*, 397 U.S. at 756 (defendant "was made aware of the nature of the charge against him").

3. Viewed in light of *Bailey*, the description of the elements of Section 924(c) at petitioner's plea hearing was materially inaccurate, and the plea was not intelligent and voluntary in the constitutional sense. The record establishes that all of the participants at the change-of-plea hearing incorrectly believed that a defendant could be convicted of using a firearm in violation of Section 924(c) even if the defendant had not made active use of the firearm, but had merely possessed it. See pp. 4-6, *supra*. And the record did not establish that petitioner admitted active use of a firearm.

Ordinarily, it is appropriate to presume that defense counsel has explained the nature of the offense in sufficient detail to give the defendant adequate notice. *Henderson*, 426 U.S. at 647; *Marshall v. Lonberger*, 459 U.S. 422, 436 (1983). As in *Henderson*, however, the record in the present case refutes the

ordinary presumption. See 426 U.S. at 646-647. Petitioner entered his plea of guilty under the misimpression that the facts proffered by the United States established that he had used a firearm in violation of Section 924(c), when in reality those facts did not establish that conclusion. Also as in *Henderson*, petitioner in the present case "made no factual statement or admission necessarily implying that" he had violated Section 924(c) properly understood. *Id.* at 646.<sup>15</sup> Under the circumstances, petitioner had "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Id.* at 645 n.13.

**C. Petitioner Failed To Raise His Claim On Direct Appeal, He Cannot Show Cause For That Default, And He Therefore May Obtain Relief Only By Establishing Actual Innocence**

**1. Petitioner defaulted his claim by not raising it on direct appeal**

Petitioner's claim is that the record of the plea proceeding establishes that his plea of guilty was not intelligent and voluntary. Pet. Br. 14-18. Such claims, like other challenges to the facial adequacy of a guilty plea proceeding, are properly raised on a direct appeal from the conviction entered as a result of the plea. This Court and others have so held with respect to the related claim that a plea colloquy was

<sup>15</sup> In many cases in which a defendant pleaded guilty to violating Section 924(c) before the decision in *Bailey*, the defendant will have made admissions during the plea proceedings establishing a violation of Section 924(c) as this Court construed it in *Bailey*. In such cases, the defendant's Section 924(c) conviction should be sustained. See, e.g., *Woodruff v. United States*, No. 96-3692, 1997 WL 768941, at \*6 (7th Cir. Dec. 15, 1997); *Barnhardt*, 93 F.3d at 709-711.

conducted in violation of Federal Rule of Criminal Procedure 11. See *Timmreck*, 441 U.S. at 784 (claim that guilty plea proceeding was conducted in violation of Rule 11 "could have been raised on direct appeal"); *McCarthy*, 394 U.S. at 459 (direct appeal raising claim that guilty plea proceeding was conducted in violation of Rule 11); *United States v. Dewalt*, 92 F.3d 1209, 1211-1213 (D.C. Cir. 1996) (direct appeal claiming Rule 11 violation on ground that defendant was not properly advised of nature of offense).

It is well established that Section 2255 "will not be allowed to do service for an appeal." *Reed v. Farley*, 512 U.S. 339, 354 (1994) (quoting *Sunal v. Large*, 332 U.S. 174, 178 (1947)). It is equally well established that a federal prisoner procedurally defaults those claims not raised on direct appeal. *Ibid.* ("Where the petitioner—whether a state or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation.'") (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). See also *United States v. Frady*, 456 U.S. 152, 168 (1982) (where Section 2255 movant raised claim of error that was not raised at trial or on direct appeal, movant was required to establish cause for his "double procedural default").

Petitioner, however, did not raise a claim that his plea was invalid on direct appeal; his direct appeal was limited to a sentencing claim. Pet. C.A. Br. (No. 90-5598). Petitioner therefore procedurally defaulted his claim. See *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997) (Section 2255 movant procedurally defaulted claim that plea was invalid in light of *Bailey*, by not raising claim on direct appeal); *Bateman v.*

*United States*, 875 F.2d 1304, 1305-1307 (7th Cir. 1989) (Section 2255 movant who pleaded guilty procedurally defaulted claim that intervening decision established his innocence, by not presenting it on direct appeal).<sup>16</sup>

Petitioner and his amici advance two arguments in support of their claim that petitioner did not default his claim by failing to raise it on direct appeal. Neither is persuasive.

First, amici NACDL/FAMM argue that there was no procedural default in this case because "no specific procedural rule" required petitioner to raise his claim on direct appeal. NACDL/FAMM Amici Br. 15. *Reed* and *Frady*, however, make clear—as had a long line of cases before them—that criminal defendants are generally obliged to raise their claims on direct appeal. Nothing in this Court's cases suggests that any greater specificity is required, or that a procedural bar must be erected by statute or rule rather than by decisional law. In fact, this Court's cases are to the contrary. See, e.g., *Smith v. Murray*, 477 U.S. 527, 533 (1986) (state habeas petitioner procedurally defaulted claim by failing to raise claim on direct appeal, where Virginia decisional law provided that such a failure "ordinarily" bars further consideration of claim in subsequent proceedings).

Second, petitioner and amici NACDL/FAMM argue that petitioner's claim falls within an exception to the

<sup>16</sup> Some courts have considered collateral attacks on guilty pleas after *Bailey* without inquiring into procedural default. E.g., *Lee v. United States*, 113 F.3d 73, 74-77 (7th Cir. 1997) (permitting Section 2255 movant to attack guilty plea to Section 924(c) violation notwithstanding failure to raise claim on direct appeal; no discussion of procedural default); *Barnhardt*, 93 F.3d at 708 (same). In our view, those decisions are not compatible with the general rule applied in *Frady*.

general requirement that claims be presented on direct appeal, applicable to claims which cannot be presented without further factual development. Pet. Br. 33-34; NACDL/FAMM Amici Br. 16. Although there is such an exception, petitioner's case does not fall within it.

It has long been understood that attacks on the validity of a conviction that do not require proof outside the record generally must be presented on direct appeal, while those that require such proof may in some circumstances be raised for the first time in a collateral motion. Compare, *e.g.*, *Timmreck*, 441 U.S. at 784 (claim of Rule 11 violation could have been raised on direct appeal), and *Sunal*, 332 U.S. at 177 ("Moreover, this is not a situation where the facts relied on were dehors the record and therefore not open to consideration and review on appeal."), with, *e.g.*, *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (claim that guilty plea was coerced by threats properly raised in habeas petition; "The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal.").

Petitioner's own characterization of his claim, however, makes clear that it could have been properly presented in a direct appeal, because it did not turn on facts outside the record. See, *e.g.*, Pet. Br. 11 ("the fundamental defect that undermines the reliability of his guilty plea is apparent on the record"), 16 ("[t]he defects appear on the face of the record").<sup>17</sup> Under

<sup>17</sup> The need for further proceedings to determine whether petitioner can establish actual innocence in order to be heard on his defaulted claim, see pp. 40-42, *infra*, is not inconsistent with that conclusion. Petitioner could have presented on direct appeal the claim that his plea was not intelligent and voluntary, because the record of the plea proceedings established the basis

those circumstances, petitioner was obliged to present his claim on direct appeal, and his failure to do so was a procedural default. Cf., *e.g.*, *McCleese v. United States*, 75 F.3d 1174, 1178 (7th Cir. 1996) (Section 2255 movant procedurally defaulted claim of ineffective assistance of counsel by failing to raise claim on direct appeal; although such claims may be raised in Section 2255 motion if extrinsic proof is required, they must be raised on direct appeal if no such proof is necessary).

Petitioner (Br. 19) and amici NACDL/FAMM (Br. 16) argue that the Eighth Circuit requires that claims of plea involuntariness be raised in a Section 2255 motion rather than on direct appeal, and that petitioner's adherence to that requirement cannot constitute a procedural default. The law in the Eighth Circuit, however, appears to be that claims requiring the development of facts outside the record—such as a claim that a plea was involuntary because coerced in some way—need not be raised on direct appeal, but claims that do not require such factual development are properly raised on direct appeal.<sup>18</sup> That approach is consistent with the rules of

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for claiming that the elements of a Section 924(c) violation were incorrectly described. Had petitioner properly raised his claim on direct appeal, there would have been no procedural default and therefore no occasion to inquire into whether that default could be excused because of actual innocence.

<sup>18</sup> See, *e.g.*, *United States v. Young*, 927 F.2d 1060, 1061 (8th Cir.) (Rule 11 claims—including claim that defendant was not adequately advised of nature of charges—can be resolved on record of plea hearing and are properly raised on direct appeal; claims of ineffective assistance of counsel, breach of plea agreement, and involuntariness of plea should be presented to trial court in motion to withdraw guilty plea), cert. denied, 502

procedural default generally applied in federal courts. Petitioner therefore must establish a basis for having his claim heard despite his procedural default.

**2. Petitioner has failed to establish cause for his procedural default**

A Section 2255 movant who has procedurally defaulted a claim can obtain relief only by demonstrating "cause and actual prejudice." *Frady*, 456 U.S. at 167. To show cause for failing to raise a claim on appeal, a Section 2255 movant must identify "some external impediment preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 492 (1986). For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, \* \* \* or that some interference by officials \* \* \* made compliance impracticable, would constitute cause under this standard." *Id.* at 488. "Attorney error that constitutes ineffective assistance of counsel" would also constitute cause. *Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991).

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U.S. 943 (1991); *United States v. Murphy*, 899 F.2d 714, 716 (8th Cir. 1990) (claims of ineffective assistance of counsel, involuntariness of plea, and breach of plea agreement normally should be raised in Section 2255 motion, "because normally such a claim cannot be advanced without the development of facts outside the original record"); *United States v. Briscoe*, 428 F.2d 954, 956-957 (8th Cir.) (claims that plea was involuntary not properly brought on direct appeal, because "[a]llegations of coercive or psychological circumstances, ineffective assistance of counsel, illicit plea bargaining or other factual circumstances" require factual development by trial court; court considers on direct appeal, however, question whether defendant was properly advised of nature of charged offense), cert. denied, 400 U.S. 966 (1970).

The court of appeals correctly concluded that petitioner had not shown cause for his procedural default.<sup>19</sup> In this Court, petitioner does not contend that his attorney was ineffective. Rather, he asserts that his failure to raise his claim on direct appeal should be excused because it would have been "futile" for him to have raised the claim at that time. Pet. Br. 35. See also NACDL/FAMM Amici Br. 19, 21-22 & n.14 (citing cases excusing defendants' failure to challenge their Section 924(c) convictions prior to *Bailey*). It is true that, at the time of petitioner's plea, the Eighth Circuit had rejected analogous claims that a conviction for using a firearm in violation of Section 924(c) requires proof of "active use" of the firearm in question. See p. 16, *supra*. But this Court has squarely held that "futility alone cannot constitute cause." *Engle*, 456 U.S. at 130 n.36.

In *Engle*, three state prisoners sought federal habeas relief, claiming that an instruction at their trials requiring them to bear the burden of proving the affirmative defense of self-defense violated their due-process rights. 456 U.S. at 121-122. The prisoners had made no such objection at the time of trial, and thus had procedurally defaulted their claim. *Id.* at

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<sup>19</sup> It is not essential for this Court to resolve the question whether petitioner could establish "cause" for his procedural default. Even if petitioner could establish such cause, he would be entitled to relief only if he could also establish prejudice. Petitioner's sole claim of prejudice in this case is that he is actually innocent. Pet. Br. 36. A showing of actual innocence, however, would permit petitioner to obtain relief even if he could not establish cause. See pp. 40-42, *infra*. Thus, regardless whether petitioner can establish cause for his procedural default, he could obtain relief only if he could establish his actual innocence.

124-125. The prisoners argued, however, that their procedural default should be excused because it would have been futile for them to have raised the claim in state court. *Id.* at 130. This Court held that the futility of raising a claim cannot establish cause for a procedural default:

[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. \* \* \* Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.

*Ibid.* Although *Engle* involved a state prisoner, the Court has repeatedly emphasized that procedural-default principles apply equally to federal and state prisoners. See, e.g., *Frady*, 456 U.S. at 166 (“[W]e see no basis for affording federal prisoners a preferred status when they seek postconviction relief.”).

The prisoners in *Engle* also argued that their procedural default should be excused because their due-process claim was so novel that it could not reasonably have been known at the time of trial. 456 U.S. at 130-131. Leaving open the question whether such novelty could ever constitute cause, *id.* at 131, the Court held that the prisoners’ claim was not so novel as to excuse their procedural default. *Id.* at 131-134. As the Court explained, “[w]here the basis of a \* \* \* claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.” *Id.* at 134.

In *Reed v. Ross*, 468 U.S. 1 (1984), the Court resolved the question it had left open in *Engle*, holding

that, “where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim.” *Id.* at 16. The Court in *Reed* held that the particular claim at issue in that case was sufficiently novel as to excuse the state prisoner’s procedural default. *Id.* at 16-20. The Court reached that conclusion for three reasons: (1) the claim at issue challenged a practice that the Court itself had “arguably sanctioned”; (2) the practice at issue was deeply entrenched in state law, and had been so for more than a century; and (3) the case law at the time provided no direct support for the claim. *Id.* at 17-19. The Court also emphasized that the claim at issue in *Reed* was not being perceived and litigated by other defendants. *Id.* at 19-20.

*Reed* is of no assistance to petitioner. Petitioner’s claim—that he should have been informed that Section 924(c) requires proof of “active use” of the firearm—was not “novel” within the meaning of *Reed* when petitioner failed to raise it on appeal. To the contrary, many defense counsel perceived the claim that “use” should entail “active use,” and many raised it, or variations of it, in the courts of appeals.<sup>30</sup>

<sup>30</sup> See, e.g., *United States v. Cooper*, 942 F.2d 1200, 1206-1208 (7th Cir. 1991) (defendant took direct appeal from guilty plea to violation of Section 924(c), arguing that plea proceedings failed to establish that he used firearm rather than simply possessing it), cert. denied, 503 U.S. 923 (1992); *United States v. Bruce*, 939 F.2d 1053, 1055-1056 (D.C. Cir. 1991) (reversing Section 924(c) conviction for insufficient evidence, where firearm was recovered from coat pocket in which drugs were located); *United States v. Ross*, 920 F.2d 1530, 1536 (10th Cir. 1990) (defendant challenged sufficiency of evidence to support Section 924(c) conviction on ground that there was no evidence

Although the courts of appeals had rejected that claim in its broadest form, this Court noted that they disagreed over the proper definition of "use" for purposes of Section 924(c). See *Bailey*, 516 U.S. at 142 (Section 924(c) was "the source of much perplexity in the courts," and the courts of appeals were "in conflict both in the standards they ha[d] articulated \* \* \* and in the results they ha[d] reached"). Under the circumstances, petitioner's procedural default cannot be excused on novelty grounds. See, e.g., *Smith v. Murray*, 477 U.S. at 537 ("[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all."); Court rejects assertion that claim was novel where "various forms of the claim \* \* \* had been percolating in the lower courts for years").

Petitioner argues that, unless a futility exception is recognized in a case like this, "defense counsel would be obliged to submit a laundry list of demands that all constitutional guarantees be observed at all times, and appellate counsel would have to seek review of every well-settled circuit rule to avoid 'default.'" Pet. Br. 34. See also NACDL/FAMM

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of use, brandishing, or display); *United States v. Ocampo*, 890 F.2d 1363, 1370-1371 (7th Cir. 1989) (defendants argued that firearm was not used within meaning of Section 924(c) because it was not displayed, brandished, or actually possessed); *United States v. Acosta-Cazares*, 878 F.2d 945, 951 (6th Cir.) (defendant contended that "use" within meaning of Section 924(c) requires "brandishment or display"), cert. denied, 493 U.S. 899 (1989); *United States v. Meggett*, 875 F.2d 24, 27-29 (2d Cir.) (defendant contended that firearm was not used within meaning of Section 924(c) because it was not fired, brandished, or handled), cert. denied, 493 U.S. 858 (1989).

Amici Br. 18-20. The Court has already held in *Engle* that futility does not establish cause, and petitioner's argument thus amounts to a thinly veiled disagreement with *Engle*. In any event, petitioner's concern is unfounded. Petitioner provides no evidence that, in the nearly twenty years since *Engle*, defendants have responded by deluging trial or appellate courts with laundry lists of objections to well established rules. Such a response would be highly unlikely, particularly in light of this Court's decision in *Teague*, *supra*, which generally precludes prisoners from obtaining collateral relief on the basis of decisions overturning well established rules. See *Butler v. McKellar*, 494 U.S. 407, 412 (1990). There would be little incentive to make an endless series of objections to well established rules in the hope that the one of them would subsequently be overturned.

The logic of petitioner's argument suggests that a futility exception to the "plain error" standard should apply on direct appeal as well. Absent such an exception, defendants arguably have an incentive to make a laundry list of objections at trial in order to preserve all possible issues for direct appeal, in the event that a well established rule were overturned after trial. In fact, however, there is no futility exception on direct appeal. When a defendant fails to object at trial to a ruling that was plainly supported by existing precedent, the plain-error standard of review applies. *Johnson v. United States*, 117 S. Ct. 1544, 1548-1550 (1997). The defendant may establish the obviousness of the error by referring to the law as of the time of appeal, but otherwise must bear the burden of showing that the error affected his substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Ibid.* There is no

indication that the lack of a futility exception in that setting has led to a flood of objections to well established rules.

**3. The case should be remanded for a determination whether petitioner is actually innocent**

Because petitioner defaulted his claim, and cannot establish cause for that default, his claim cannot be reviewed in this collateral proceeding unless the case "falls within the 'narrow class of cases \* \* \* implicating a fundamental miscarriage of justice.'" *Schlup v. Delo*, 513 U.S. 298, 314-315 (1995) (quoting *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)). A claim of actual innocence serves as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). A prisoner may show that his is the "extraordinary case" that falls within that class, *id.* at 324, by establishing that a constitutional error "has probably resulted in the conviction of one who is actually innocent," *Murray v. Carrier*, 477 U.S. at 496; see also *Schlup*, 513 U.S. at 327.

To establish actual innocence after a trial, a prisoner must show that "it is more likely than not that no reasonable juror would have convicted him" in light of "all the evidence." *Schlup*, 513 U.S. at 327-328. In a case in which an actual-innocence claim is raised after entry of a guilty plea, the parallel inquiry should encompass not only the proffer and admissions at the plea proceeding, but also any additional evidence adduced by the parties that supports or undermines the actual-innocence claim.

Because "actual innocence" means factual innocence, and not mere legal insufficiency, see, *e.g.*, *Her-*

*rera*, 506 U.S. at 404; *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (opinion of Powell, J.), petitioner cannot carry his burden to show that he is more likely than not innocent simply by pointing to events at the moment of his arrest and by limiting the court's consideration to the record created at the Rule 11 hearing. See *Schlup*, 513 U.S. at 327-328 (actual-innocence determination must be made "in light of all the evidence"). Moreover, the government would not be bound by the existing record—which was created to satisfy a pre-*Bailey* understanding of Section 924(c)'s "use" element—should it wish to rebut any showing petitioner might make. Instead, the government would have the opportunity to present evidence, if any, that it had no occasion to present before "use" was understood to mean "active employment."

In this case, petitioner would be entitled to have his defaulted voluntariness claim considered only if he could show that he is actually innocent of a Section 924(c) offense as construed in *Bailey*. That would entail a showing both that he did not actively employ a firearm during and in relation to a drug-trafficking offense on or about March 19, 1990, and that he did not "carry" a firearm in those circumstances.<sup>21</sup> Only if

<sup>21</sup> Section 924(c) prohibits both using and carrying firearms during and in relation to a drug-trafficking offense. 18 U.S.C. 924(c); cf. *Muscarello v. United States*, cert. granted, No. 96-1654 (Dec. 12, 1997); *Cleveland v. United States*, cert. granted, No. 96-8837 (Dec. 12, 1997) (presenting question of meaning of "carry" under Section 924(c) when a firearm is transported in a vehicle). Petitioner can hardly be said to be innocent if he carried a firearm during and in relation to his acknowledged drug-trafficking offense, even if he did not actively use it. While the indictment in the present case charged petitioner solely with using the firearms in question, J.A. 5-6, the actual-

petitioner could demonstrate on a full record that he did not actively employ or carry a firearm during and in relation to a drug-trafficking crime on or about March 19, 1990, would he be able to pass through the actual-innocence "gateway \* \* \* to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404.

Petitioner errs in asserting (Br. 36-37) that, on the present record, he is entitled to an order dismissing the Section 924(c) charge in the indictment. No court has fully considered the evidence that bears on the actual-innocence inquiry. And unless and until petitioner carries his burden of showing actual innocence, he is entitled to no relief at all. Even if such a showing were made, petitioner would be entitled at most to vacation of his Section 924(c) conviction, subject to resentencing on the remaining drug count.<sup>22</sup>

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innocence inquiry should not be limited to the particular manner of commission of the offense that was alleged in the indictment. Cf. *Smith v. Murray*, 477 U.S. at 537 (distinguishing "actual" innocence from "legal" innocence").

<sup>22</sup> When a defendant successfully obtains vacation of one of a number of related convictions, the United States often is entitled to have the defendant resentenced on the remaining counts of conviction. See, e.g., *Pasquarille v. United States*, No. 96-6315, 1997 WL 754155, at \*2 (6th Cir. Dec. 9, 1997) ("Every circuit that has considered this issue has held that the district court has the authority to resentence a defendant who has secured reversal of a § 924(c) conviction under § 2255.") (citing cases). In this case, if petitioner were resentenced on his remaining conviction for violating 21 U.S.C. 841(a)(1), the district court properly should impose a two-level enhancement in the offense level applicable to that charge based on petitioner's possession of a gun during the drug offenses. See *ibid.* In addition, the district court could properly consider claims of

## CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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DECEMBER 1997

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error in the imposition of the original sentence on the drug count, see, e.g., note 6, *supra*. Moreover, although the issue does not arise in the present case, in cases in which charges were dismissed as part of the plea agreement the government should be permitted to resume prosecution on those dismissed counts. See, e.g., *Barron*, 127 F.3d at 895-897. And courts have other authority to fashion fair remedies—or to limit relief—in the exercise of their equitable discretion. See, e.g., *McCleskey*, 499 U.S. at 501 (discussing question whether the "Court should \* \* \* exercise its equitable discretion to correct a miscarriage of justice").

# REPLY BRIEF

(1)  
No. 96-8516

SUPREME COURT  
F I D H O  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1997

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KENNETH EUGENE BOUSLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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**REPLY BRIEF FOR THE UNITED STATES**

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## In the Supreme Court of the United States

OCTOBER TERM, 1997

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No. 96-8516

KENNETH EUGENE BOUSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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### REPLY BRIEF FOR THE UNITED STATES

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The amicus curiae appointed by this Court to defend the judgment of the court of appeals advances three main arguments. First, amicus claims that petitioner's reliance in his collateral motion on the supervening decision of this Court in *Bailey v. United States*, 516 U.S. 137 (1995), which narrowed the scope of the offense to which he pleaded guilty, is barred under principles drawn from *Teague v. Lane*, 489 U.S. 288 (1989). Second, amicus contends that petitioner's guilty plea itself forecloses the collateral attack, because the plea was valid in light of then-existing law. Third, amicus argues that if petitioner has a meritorious constitutional claim that his plea was not knowing, intelligent, and voluntary, he can-

not overcome his procedural default of that claim even if he shows that he is actually innocent of the charged offense. Those contentions lack merit.

1. Amicus reasons (Br. 3) that *Teague* principles preclude the retroactive application of *Bailey* in cases on collateral review because “[s]urely, if new rules of constitutional significance are generally unavailable in habeas proceedings, a similar preclusion should follow for less fundamental statutory rights.” We agree that *Teague* principles apply to the interpretation of statutory rules of procedure just as they do to constitutional rules of procedure. Gov’t Br. 19. The issue of statutory interpretation resolved in *Bailey*, however, did not involve procedure. Rather, it involved substance: the meaning of an element of a criminal offense. Given the character of that decision in explaining what Congress had “always meant” to be a crime under 18 U.S.C. 924(c), see *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994), the retroactive effect of *Bailey* is not controlled by *Teague*.

Amicus does not question our submission that the definition of a federal criminal offense is uniquely within the legislative province. Gov’t Br. 15-16. From that premise, it follows that if courts misconstrue the intent of Congress by erroneously expanding the coverage of a substantive crime, a defendant may be imprisoned for conduct that was never made criminal by the legislature. Separation of powers concerns are implicated in that situation, because the courts lack independent authority to create crimes. *United States v. Lanier*, 117 S. Ct. 1219, 1225 n.5 (1997). Thus, while “[n]o one would contend that Congress is powerless to proscribe the possession of guns in connection with an illegal drug deal,” Amicus

Br. 12, the issue is whether Congress has done that in Section 924(c). If not, the “offense” to which petitioner pleaded guilty may rest on conduct that courts, rather than Congress, deemed to be criminal.

The line of cases beginning with *Teague v. Lane*, *supra*, involves rules of criminal procedure, and the underlying principle in *Teague* is that perpetual reexamination of convictions that were fair under then-existing procedures would deprive the criminal law of any possibility of finality. While concerns for finality play a powerful role in limiting the retroactive effect of procedural rules, countervailing considerations must be taken into account when this Court announces a new, and narrowing, construction of a federal offense. Even if a conviction is entered after otherwise fair procedures, it does not necessarily serve as a reliable determinant of guilt where the parties to the proceeding and the court that entered judgment operated under a serious misunderstanding of what the law required to establish the charged crime.<sup>1</sup>

Amicus errs in suggesting (Br. 20) that this Court’s decision in *Gilmore v. Taylor*, 508 U.S. 333 (1993), indicates that *Teague* principles apply to decisions of this Court giving a narrowing construction to an element of a federal crime. *Gilmore*, a state prisoner, sought relief on the theory that “the jury instructions given at his trial violated the Four-

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<sup>1</sup> As amicus notes (Br. 13-15), the lower courts have applied *Teague* limitations to questions of statutory procedure and to at least one statutory sentencing limitation. No court of appeals, however, has relied on *Teague* to deny retroactive application to a decision of this Court narrowing the definition of a substantive criminal offense.

teenth Amendment's Due Process Clause \* \* \* because they allowed a jury to return a murder verdict without considering whether the defendant possessed a mental state that would support a voluntary-manslaughter verdict instead." *Id.* at 335. Gilmore based that theory on the due process holding of a federal court of appeals in another case decided after Gilmore's conviction became final. As this Court made clear, Gilmore's claim was not "that the instructions affirmatively misstated applicable state law," or even that "they somehow lessened the State's burden of proof below that constitutionally required." *Id.* at 340. Rather, his claim was that the instruction's presentation to the jury of the greater offense before the lesser offense violated due process by restricting the jury's consideration of evidence of his affirmative defense. *Id.* at 340-344. The Court held that if due process principles required such a rule relating to affirmative defenses, it would be a new rule within the meaning of *Teague*. That holding sheds no light on the retroactivity of a decision of this Court that narrows the elements of a federal crime.

Nor is amicus correct in suggesting (Br. 21) that giving retroactive effect to decisions interpreting the elements of federal criminal statutes "would trump *Teague*, *sub silentio*, and provide automatic retroactivity on collateral review for all reinterpretations of criminal statutes, without regard, presumably, to the various restrictions placed on post-conviction proceedings by this Court in recent years." *Teague* remains the controlling precedent on new rules of criminal procedure. But there is no tension between the general nonretroactivity of such rules and our position here that narrowing constructions of federal crimes are retroactive. And the remaining restric-

tions imposed by this Court<sup>2</sup> and by Congress<sup>3</sup> on the availability of collateral relief are fully applicable to prisoners such as petitioner.

2. Amicus also argues (Br. 22-35) that, even if *Bailey* has retroactive application to cases on collateral review, petitioner's guilty plea remains a valid adjudication of his guilt under 18 U.S.C. 924(c) and therefore bars a collateral attack on his conviction.

a. Amicus contends (Br. 23-25) that petitioner's plea conclusively admits the commission of an offense under Section 924(c), regardless of any misunderstanding of the elements of that offense harbored by the court, the government, and the defendant. We agree that a valid guilty plea serves not simply as an admission of acts, but as an admission of guilt of a criminal offense. *United States v. Broce*, 488 U.S. 563, 569 (1989). But an essential ingredient of a valid plea is that it be knowing, voluntary, and intelligent.

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<sup>2</sup> The principal restriction relevant here is the procedural default rule defined by this Court's cases. Under that rule, consideration on collateral review of claims not raised in a timely manner on direct appeal is barred absent a showing of cause and prejudice, except in the rare case where a defendant can show that the defaulted constitutional claim probably resulted in the conviction of a defendant who is actually innocent. See Gov't Br. 29-42.

<sup>3</sup> In the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220, Congress placed a variety of limitations on the availability of collateral relief under 28 U.S.C. 2255. See, e.g., 28 U.S.C. 2255 (one-year statute of limitations; limitations on second or successive motions). Because petitioner filed both his motion under Section 2255 and his notice of appeal before the effective date of the AEDPA, those limitations are not applicable here. See Gov't Br. 17 n.8.

*Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969). As the Court has explained:

A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.

*Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976) (citations omitted). The plea of guilty itself therefore cannot waive the issue of voluntariness. *Id.* at 644-647.

Under those principles, petitioner's guilty plea cannot, by itself, foreclose his collateral attack. The premise of treating a guilty plea as a conclusive adjudication of guilt is that the defendant had an understanding of the offense that he admitted committing. Petitioner asserts that his incomplete understanding of the "use" element of Section 924(c) gives rise to an involuntariness claim under *Henderson, supra*. The plea itself cannot resolve that claim.<sup>4</sup>

<sup>4</sup> We do not argue that petitioner "could not 'waive' a claim of which he was not aware." Amicus Br. 24 n.8. Rather, we argue that a showing, such as that made in this case, that the defendant had a seriously "incomplete understanding of the charge" means that "his plea cannot stand as an intelligent admission of guilt." *Henderson*, 426 U.S. at 645 n.13. We agree that a valid guilty plea waives a variety of constitutional rights, including the right to have a jury determine the element of "use." Amicus Br. 24 n.8. The issue here, however, is whether the plea is valid.

Amicus correctly notes (Br. 25) the importance of plea bargaining in the resolution of criminal cases. In general, the stability of the criminal justice system demands that a defendant not be permitted to escape from his end of the bargain and thus defeat the government's interest in finally resolving the case. That principle, however, should not stand as a complete barrier to a claim that, because of a change in the law, the "offense" to which the defendant pleaded guilty is not, in fact, a federal crime at all.

b. Amicus further contends (Br. 29-32) that petitioner's guilty plea must be measured solely in light of the law applicable at the time of the plea. Because petitioner's admission of guilt was valid under then-existing law, amicus argues, petitioner cannot claim that the plea was involuntary based on later legal developments. This Court's opinions in *McMann v.*

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Amicus correctly notes (Br. 23 n.7) that the plea colloquy could not have led petitioner to harbor the belief that he could be convicted for mere possession of a firearm. The colloquy made clear that petitioner's "use" of the gun had to be "during, in, and in relation to" his drug trafficking offense. J.A. 25, 27. But the fundamental point remains that all participants in the plea hearing believed that mere possession could satisfy the "use" element of Section 924(c). J.A. 25. In light of *Bailey's* holding that Section 924(c) requires active use, that belief was erroneous. Amicus suggests (Br. 23 n.7, 27 n.10, 37-38) that petitioner had doubts about whether he "used" a gun, showing that he was aware of the same argument he now makes under *Bailey* and voluntarily relinquished it. Fairly read, however, the record indicates that petitioner's questions about "use" reflected doubts about whether his possession of the firearms had the requisite relation to his drug trafficking offense (*i.e.*, the "during and in relation to" element). J.A. 28, 133-143. That is not the "active use" claim he now makes in reliance on *Bailey*.

*Richardson*, 397 U.S. 759 (1970), and *Brady v. United States*, 397 U.S. 742 (1970), do support the principle that changes in the law bearing on the premises underlying a guilty plea do not render the plea subject to collateral attack. But neither of those cases considered the question presented here, *i.e.*, whether the plea remains invulnerable even if the very definition of the offense is later narrowed. Each case involved a post-plea change in the law bearing on the advisability of admitting guilt, versus going to trial and putting the government to its proof with the attendant sentencing risks of that course of action. *McMann*, *supra* (admissibility of confession); *Brady*, *supra* (possibility of a capital sentence if convicted after a trial). Neither case involved a post-plea decision that raised doubts about whether the conduct that the defendant admitted constitutes a criminal act. See *Broce*, 488 U.S. at 572.<sup>5</sup>

Amicus's submission that review of the validity of a guilty plea is restricted to then-existing law would have unacceptable consequences.<sup>6</sup> Taken to its logi-

<sup>5</sup> Although amicus relies (Br. 31) on this Court's decision in *Broce*, that case did not involve a change of substantive law governing the definition of the offense. Rather, *Broce* held that the defendants in that case could not take advantage of a double-jeopardy ruling in another case after they had pleaded guilty, because their plea relinquished the right to litigate the double-jeopardy question at issue. There was no doubt, however, that the defendants had voluntarily pleaded guilty and acknowledged commission of the charged crimes. As the Court stated, "[r]espondents have not called into question the voluntary and intelligent character of their pleas, and therefore are not entitled to the collateral relief they seek." 488 U.S. at 574.

<sup>6</sup> As articulated by amicus (Br. 33), there is no apparent exception to that principle unless the judge "should have recognized the plea's infirmity at the time of the plea." See *ibid.*

cal extreme, that principle would mean that the plea must stand even if the statute creating the offense of conviction had later been determined to be unconstitutional.<sup>7</sup> Similarly, it would mean that even if a defendant had not admitted to a mental element of an offense at his plea hearing (because the mental element was not recognized until a later decision of this Court), he would be foreclosed from contending that his actual intent did not subject him to criminal liability.<sup>8</sup> The policies favoring finality of guilty

("In *Broce*, this Court stated that the *Blackledge/Menna* exception applies only where a constitutional infirmity is of such a nature that it should have been observed 'by the presiding judge [at the time the plea was entered] on the basis of the existing record.'" (quoting *Broce*, 488 U.S. at 575) (bracketed phrase added in order to complete quote from *Broce*).

<sup>7</sup> For example, in *United States v. Lopez*, 514 U.S. 549 (1995), this Court declared the Gun-Free School Zones Act, 18 U.S.C. 922(q) (1988 & Supp. V 1993), to be unconstitutional because it exceeded Congress's power under the Commerce Clause. A defendant who had entered a guilty plea under Section 922(q) before *Lopez* could thus be forever foreclosed from collaterally attacking his conviction notwithstanding this Court's later declaration that the statute under which he stands convicted is unconstitutional. But see *United States v. Knowles*, 29 F.3d 947, 950-952 (5th Cir. 1994) (rejecting plain-error and guilty-plea bar arguments, and relying on *Menna v. New York*, 423 U.S. 61 (1975), to grant relief from a Section 922(q) guilty plea in light of the Fifth Circuit's post-plea decision in *Lopez*, which this Court later affirmed).

<sup>8</sup> For example, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), this Court held that a currency-structuring offense under former 31 U.S.C. 5322(a) required proof that the defendant knew that structuring is illegal. A strict "then-existing law" rule would mean that a guilty plea that did not admit that element (because such proof was not required under then-existing circuit law) would inflexibly bar the defendant from arguing that his conduct was not a crime. But see *United*

pleas are powerful, but they are not the exclusive concern of the criminal law. A well-founded claim that a defendant never acknowledged commission of the crime, because in light of a subsequent change in law he was never correctly informed of its elements, undermines confidence that the guilty plea represents a reliable basis for imposing a judgment of conviction. Accordingly, in this limited setting, we believe that a defendant may rely on later legal developments in contending that his guilty plea was not voluntary and intelligent in the constitutional sense.

c. Amicus acknowledges that “[f]or a plea to be voluntary, a defendant must receive ‘real notice of the true nature of the charge against him.’” Br. 29 (quoting *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O’Grady*, 312 U.S. 329, 341 (1941))). He contends, however, that this requirement was satisfied on the facts of this case because the indictment charged, and the plea agreement stipulated, that petitioner “used” a firearm. Amicus Br. 32. There is no doubt that the indictment sufficiently charged an offense under Section 924(c) and that the plea agreement adequately stipulated to its commission. But there is equally no doubt that at the plea colloquy the district court advised petitioner that the use element was satisfied by “possession.” J.A. 25 (“[The indictment] also charges you with possessing the firearms, during, in, and in relation to a drug trafficking crime.”). *Bailey* makes clear that this

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*States v. Brown*, 117 F.3d 471 (11th Cir. 1997) (rejecting “then-existing law” and *Teague* arguments, and granting relief from a structuring guilty plea in light of this Court’s later decision in *Ratzlaf*).

advice was incorrect. *Bailey*, 516 U.S. at 144 (“[A] conviction for ‘use’ of a firearm under § 924(c)(1) requires more than a showing of mere possession.”). Accordingly, in the sense used by this Court in *Henderson*, petitioner was deprived of notice of the charge to which he entered a plea of guilty. And it is that deprivation of notice that gives rise to his constitutional claim.

3. Amicus agrees with us that petitioner defaulted his constitutional attack on his guilty plea and that he cannot show “cause” to excuse that procedural default. Br. 35-39. Amicus contends (Br. 40), however, that this Court’s cases recognizing an “actual innocence” exception that allows consideration of a defaulted constitutional claim “do not apply to convictions premised on guilty pleas.” This Court’s decisions do not support the limitation suggested by amicus.<sup>9</sup> In *Schlup v. Delo*, 513 U.S. 298 (1995), this Court held that a claim of actual innocence serves as “a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits,” *id.* at 315 (internal quotation marks omitted), but if such a showing is made, the “petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.” *Id.* at 316. Although *Schlup* involved a conviction after a trial rather than a conviction on a

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<sup>9</sup> Nor are we aware of any court of appeals so holding. To the contrary, the Eighth Circuit has considered whether a showing of “actual innocence” may justify consideration of a defaulted constitutional challenge to a conviction entered on a guilty plea. See *Weeks v. Bowersox*, 119 F.3d 1342 (8th Cir. 1997) (en banc) (entertaining, and rejecting on the facts, a claim that a defendant who pleaded guilty met the “actual innocence” test), cert. denied, No. 97-6846 (Jan. 26, 1998).

guilty plea, three points of analysis critical to the holding in *Schlup* are highly relevant here.

First, the Court was careful to distinguish between a free-standing claim of actual innocence, which presupposes an entirely error-free and fair trial and simply challenges the correctness of the result, on the one hand, and a "procedural" claim of actual innocence, on the other. 513 U.S. at 314. A "procedural" claim of innocence "does not by itself provide a basis for relief," but instead "depends critically" on the validity of underlying constitutional claims. *Id.* at 315. The showing of "actual innocence" in this context simply permits collateral review of the underlying claims, which would otherwise be barred by the unexcused procedural default. *Ibid.* Second, the Court made clear that, because there is an assertion of constitutional error, the "conviction may not be entitled to the same degree of respect as one \* \* \* that is the product of an error-free trial." *Id.* at 316. Put another way, strong evidence of innocence may present a situation in which, "unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Ibid.* Third, the "actual innocence" gateway reflects the view that "[i]n appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* at 320-321 (internal quotation marks omitted). "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Id.* at 325. Thus, "we have consistently reaffirmed the

existence and importance of the exception for fundamental miscarriages of justice." *Id.* at 321.

Those features of the Court's analysis are equally applicable to a claim of the character presented here, *i.e.*, that a conviction obtained by a plea of guilty is constitutionally flawed because the defendant lacked "real notice of the true nature of the charge against him," *Henderson*, 426 U.S. at 645 (internal quotation marks omitted), and, that under a proper understanding of the law, the defendant is actually innocent. A guilty plea in this setting does not rule out the possibility of innocence. While the "actual innocence" exception has no application where guilt is "conceded," *Schlup*, 513 U.S. at 321 (quoting *Smith v. Murray*, 477 U.S. 527, 452 (1986) (plurality opinion)), a plea of guilty cannot operate as a true concession of guilt where, as alleged here, the defendant lacked "an understanding of the law in relation to the facts." *Broce*, 488 U.S. at 570 (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). In this case, for example, petitioner's concession that he "used" a firearm provides no assurance that he actually did so, given that the district court defined "use" as possession, J.A. 25, and no facts were adduced at petitioner's plea hearing that indicated actual, active "use."<sup>10</sup>

Under these circumstances, it is possible that petitioner did not commit acts that satisfy all of the essential elements of a violation of Section 924(c). If

<sup>10</sup> For that reason, while amicus is correct (Br. 43) to observe that claims of actual innocence made by a defendant who has pleaded guilty should be viewed with much skepticism in the ordinary case, that rationale does not apply with equal force where the underlying plea, evaluated in light of a proper understanding of the substantive law, did not constitute a complete admission of the elements of a crime.

such a showing is sustained, it is appropriate to regard petitioner as “actually innocent” of the Section 924(c) offense. That is not to say that petitioner has led a “blameless life.” *Schlup*, 513 U.S. at 328 n.47. Even if the most that petitioner has done is to possess a firearm for protection in his drug trafficking, his conduct still exposes him to enhancement of his drug sentence. See Sentencing Guidelines § 2D1.1; *United States v. Watts*, 117 S. Ct. 633 (1997) (per curiam). But such an enhancement is not the sentence that petitioner received; rather, he sustained an independent conviction under Section 924(c). If petitioner did not carry or actively use his firearm, the five-year sentence he received for violating Section 924(c) is not supported by his guilt of that offense. And such a showing satisfies this Court’s articulation of “actual innocence.”<sup>11</sup>

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<sup>11</sup> Amicus suggests (Br. 45-46) that a showing that petitioner did not actively “use” a firearm would not support a claim of “actual innocence,” but would at most amount to “legal innocence” or “technical innocence.” That is incorrect. Under *Bailey*, mere possession of a firearm during and in relation to a drug offense does not satisfy the “use” element of the crime. If no more evidence existed than that, a showing of “actual innocence” would be established. See *Schlup*, 513 U.S. at 327 (“To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.”). Of course, the determination of actual innocence is not limited to the facts presented at a prior proceeding. Accordingly, a “technical” defect in the factual basis adduced at petitioner’s guilty plea hearing would not satisfy his burden. Petitioner may not simply point to the guilty plea record in this case to establish his actual innocence. Even if those facts were legally insufficient, petitioner could not prevail unless he affirmatively offers credible evidence of his innocence, and all of the evidence, including that presented by the government,

Claims of actual innocence in this context should remain the exceptional case, as *Schlup* envisioned. 513 U.S. at 321. As amicus correctly notes (Br. 42-43), petitioner is clothed with a “presumption of guilt,” 513 U.S. at 326 n.42, and bears a significant burden to show that it is more likely than not that, under a proper legal standard, he did not “use” or carry a firearm. Gov’t Br. 40-41; *Schlup*, 513 U.S. at 324 (requiring the defendant to adduce “new reliable evidence”). This is not a minimal showing. As this Court has recognized, “habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare.” *Schlup*, 513 U.S. at 321. Nothing in our submission suggests that prisoners may readily disavow their guilty pleas, deluge the courts with new-found claims of innocence, and assert entitlement to full-blown evidentiary hearings. We do not advance the view that a free-standing claim of actual innocence, without more, would entitle a defendant who pleaded guilty to enter the courthouse door and litigate his claim. Rather, as in *Schlup* itself, the actual innocence gateway lifts the bar of a default only where there is an underlying constitutional claim that the defendant presents.

In the context of a guilty plea, very few such constitutional claims exist, since a counseled and voluntary guilty plea forecloses virtually all attacks on the conviction based on antecedent constitutional

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showed that petitioner indeed did no more than possess the firearm. *Id.* at 327-330. But if such a showing were made, it would satisfy the “innocence” standard applied in *Schlup*.

claims.<sup>12</sup> See *Broce*, 488 U.S. at 569; *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Thus, it should be the rare case in which a hearing is required or when relief is actually granted. Resolving those cases, of course, imposes a burden on the judicial system, for reconstructing the circumstances of the plea (and the underlying case) may prove difficult. Cf. *Parke v. Raley*, 506 U.S. 20, 31-32 (1992). The limited burden on the government and the trial courts in this instance, however, acknowledges the interest in avoiding continued confinement of a defendant who can establish that he is not guilty of a crime and whose conviction rests on harmful constitutional error. The redefinition of a federal crime through a narrowing judicial construction of its elements may generate a number of claims to relief that would not otherwise exist. But acceptance of the possibility of such claims reflects the premium placed on the avoidance of the "claimed injustice \* \* \* [where] constitutional error has resulted in the conviction of one who is actually innocent of the crime." *Schlup*, 513 U.S. at 324; see *id.* at 333 (O'Connor, J., concurring) (*Schlup* standard "properly balances the dictates of justice with the need to ensure that the actual innocence

<sup>12</sup> A petitioner would also have to comply with applicable statutory restrictions on the issuance of collateral relief, including those restrictions enacted in the AEDPA. See note 3, *supra*. We note that some courts of appeals have permitted claimants to seek collateral relief based on *Bailey* notwithstanding the AEDPA's generally applicable limitations on second or successive collateral motions. See *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997) (guilty plea); *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997) (guilty plea); *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997) (jury trial).

exception remains only a safety valve for the extraordinary case") (internal quotation marks omitted).

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For the foregoing reasons and those stated in our principal brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN  
Solicitor General

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